SUPREME COURT, U. S.

FILED

OCT 23 19

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1999

JIM POOLE,
Petitioner,

vs.

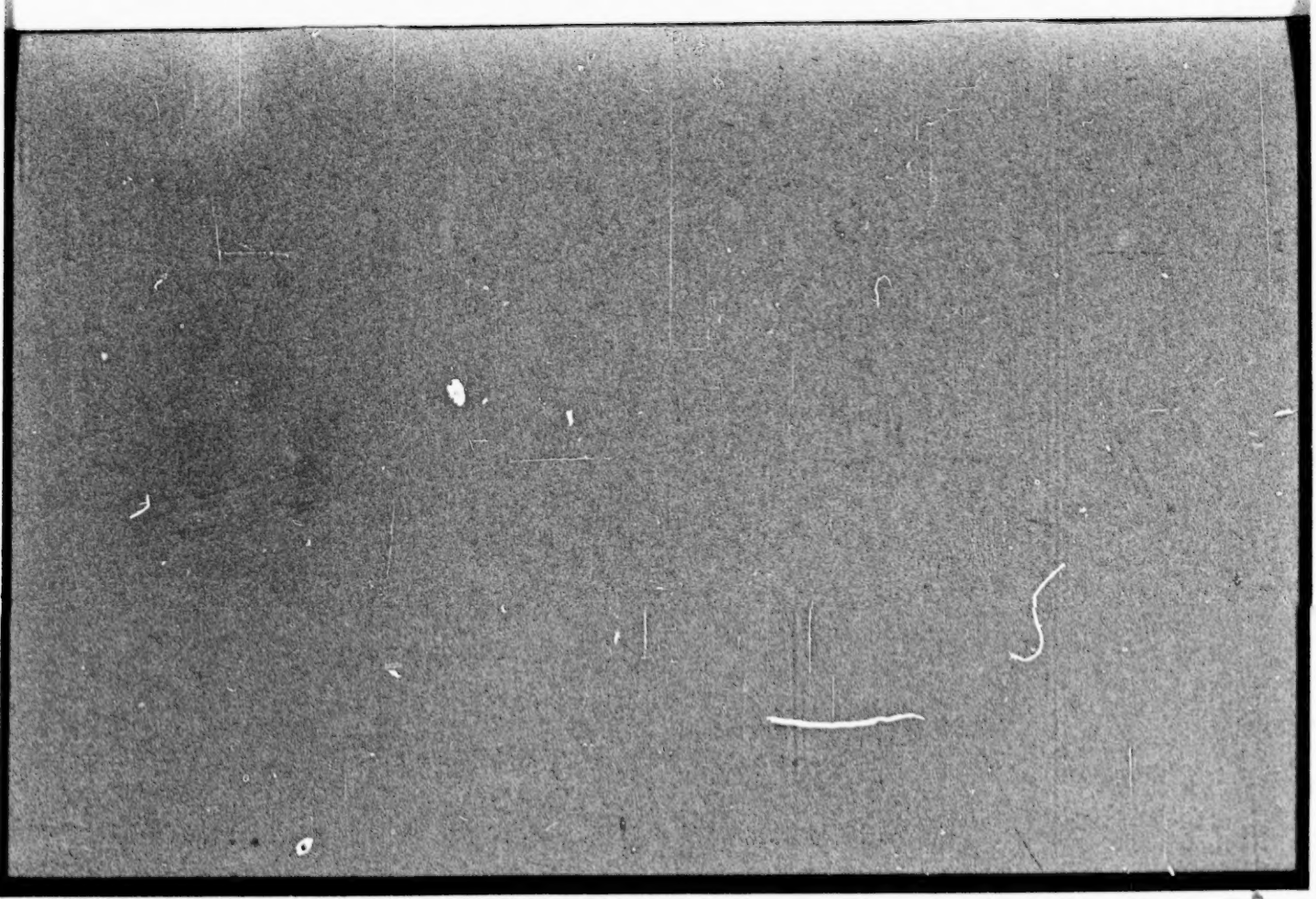
STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

A. F. SUMMER
Attorney General
By: KAREN GILFOY
Special Assistant Attorney General

R. L. MERSERHALL, INC., 916 Cherry Street, Kansas City, Mo. 64106, 421-6000



INDEX

Opinion Below 1

Jurisdiction 1

Questions Presented 2

Statement of the Case 2

Reasons for Denying the Writ 3

Argument 4

Conclusion 9

Certificate 10

Table of Cases

Blanchard v. *U. S.*, 360 F.2d 318 (5 Cir. 1966) 7, 8

Brady v. *Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963) 4

Moore v. *Illinois*, 408 U.S. 786, 33 L.Ed.2d 706, 92 S.Ct. 2562 (1972) 4

People v. *Sacchitella*, 343 N.Y.S.2d 169 (1973) 8, 9

State of Maine v. *Cloutier*, 302 A.2d 84 (Me. 1973) 5, 6, 7

United States v. *Bailey Manufacturing Corporation*, 345 F.Supp. 410 (E.D. La. 1972) 4

United States v. *Evanchik*, 413 F.2d 950 (2 Cir. 1969) 4

United States v. *Harris*, 458 F.2d 670 (5 Cir. 1972) 4

United States v. *Jordan*, 399 F.2d 610 (2 Cir.), cert. den. 393 U.S. 1005, 89 S.Ct. 496, 21 L.Ed.2d 469 (1968) 4

United States v. *Moore*, 439 F.2d 1107 (6 Cir. 1971) 4

U. S. v. *Singer*, 43 F.Supp. 863 (E.D. N.Y. 1942) 8

Ware v. *United States*, 8th Cir. 1958, 259 F.2d 442 8

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1999

JIM POOLE,
Petitioner,

VS.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Mississippi (Petitioner's Appendix A) is reported as *Poole* v. *State*, 291 So.2d 723 (Miss. 1974).

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

(1) Whether the Mississippi Supreme Court misinterpreted *Brady* v. *Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963) by holding the due process rights of petitioner were not violated when the single tablet sold by petitioner to an agent of the Bureau of Narcotics was totally consumed through chemical analysis conducted at the state crime laboratory and thus no portion of it was available at the time a request was made for a sample to be used in conducting an independent analysis?

(2) Whether the inability of the State to preserve the evidence must result in dismissal of the indictment?

STATEMENT OF THE CASE

On July 22, 1972, Petitioner sold one tablet LSD to an agent of the Bureau of Narcotics for a purchase price of $2.00. The agent then took the tablet to the Mississippi Crime Laboratory and on July 28, 1972, Harriott Pfaffman, a toxicologist employed by the laboratory, conducted certain scientific tests on one half of the tablet and as a result of this analysis determined that the tablet contained LSD.

The toxicologist then consulted with Dr. Arthur S. Hume, the Director of the Crime Laboratory, who suggested that the remainder of the tablet be analyzed because they "judged it necessary to analyze the other half for any other drugs, such as mescaline or drugs that are quite frequently found mixed with LSD." Miss Pfaffman said she finished the analysis on the second half of the tablet in October ". . . because I was having trouble with the tablet determining what else was in it; so, therefore, it

took me a while to determine that the other [second] test proved that it contained no other dangerous drugs other than LSD."

There was no proof that the remaining half of the tablet was consumed in the laboratory analysis in order to deprive the defendant of the opportunity to have his own chemist conduct tests on the evidence. In fact, at the time of the examination of this substance the defendant had not been arrested and charged with the sale of LSD.

On February 14, 1973, Jim Poole was arrested and thereafter was indicted by the grand jury of Jackson County, Mississippi, in April, 1973. Thereafter, on April 25, 1973 a Motion for Production of a Portion of the Substance for independent chemical analysis was filed. In an attempt to comply with this motion the district attorney contacted the crime laboratory and received a letter stating that the single tablet had been totally consumed in testing. A copy of this letter had also been sent to defense counsel.

At the start of the trial on May 4, 1973, the defendant moved for a dismissal of the charges against him on grounds the substance had not been turned over to him and thus he was deprived of any defense that might have resulted from an independent chemical analysis.

REASONS FOR DENYING THE WRIT

No question of substance is presented by petitioner's assertion that his due process rights had been violated by the inability of the State to turn over a substance which had been totally consumed in testing.

Furthermore, the opinion of the Mississippi Supreme Court is not at variance with the applicable decisions of this Court.

ARGUMENT

Petitioner would urge that the Mississippi Supreme Court has misinterpreted the teachings of *Brady* v. *Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963) wherein it was held:

> We now hold that the *suppression* by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. (Emphasis added) (373 U.S. at 87, 10 L.Ed.2d at 218)

There the Court was considering suppression of evidence by the prosecution during trial. It is well settled that *Brady* does not deal with pre-trial discovery. *United States* v. *Moore*, 439 F.2d 1107 (6 Cir. 1971); *United States* v. *Evanchik*, 413 F.2d 950 (2 Cir. 1969); *United States* v. *Harris*, 458 F.2d 670 (5 Cir. 1972); *United States* v. *Jordan*, 399 F.2d 610 (2 Cir.), cert. den. 393 U.S. 1005, 89 S.Ct. 496, 21 L.Ed.2d 469 (1968); *United States* v. *Bailey Manufacturing Corporation*, 345 F.Supp. 410 (E.D. La. 1972).

Assuming only for the sake of argument that *Brady* could be made to apply to the instant case, petitioner's argument must yet fail for in *Moore* v. *Illinois*, 408 U.S. 786, 33 L.Ed.2d 706, 92 S.Ct. 2562 (1972), it was stated:

> the standards by which the prosecution's conduct is to be measured under the *Brady* rule are as follows:
>
> There must be (a) a suppression by the prosecution *after* a request by the defense, (b) the evidence must be favorable to the defense, and (c) it must be material. (33 L.Ed.2d 706, 713)

Quite obviously there was no suppression by the prosecution after a request by the defense and certainly there was no showing that the evidence would be favorable to the defense. Respondent admits the unavailable evidence was material. However, there was no showing that it would have been helpful or have a tendency to exonerate the accused by reason of its probative effect.

Respondent submits that petitioner's second contention, i.e., that inability to produce the substance for independent testing must result in dismissal of the indictment is without merit.

The case of *State of Maine* v. *Cloutier,* 302 A.2d 84 (Me. 1973) presents a very similar factual situation to the instant case. There the State took possession of one tablet alleged to be LSD. The analysis of this pill required using three-fourths of it. The defendant filed a Motion for Chemical Analysis of the drug by an independent chemist. The Court denied his motion and the Supreme Court of Maine held that it was not error to overrule the defendant's motion:

> In Jackson v. State, (1971-Miss.) 243 So.2d 396 the State had in its possession 12 boxes of matchbox size "filled" with marijuana. The Court, acting not under a Rule but pursuant to its inherent power to provide "due process" and "fair trial," held the refusal of the trial court to make a portion of the substance available to the defendant to be an abuse of discretion. *Obviously, the problem facing the Mississippi Court was minimized by the quantity of marijuana available for testing.* We do not think that it necessarily follows that the Court would have reached the same result if it had been dealing with a relatively minute quantity of LSD-25 or that the Court would have hesitated to impose a rule of reasonableness in judging the merits

of a specific request. (302 A.2d 84 at 88) (Emphasis added)

And, in laying a foundation for the treatment of future requests for independent analysis, it was held:

> With the increasing volume of cases involving the unlawful possession and sale of drugs, we can anticipate that many motions for independent drug analysis will be addressed to the trial courts which, we emphasize, must be considered and decided in accordance with their varying facts on a case by case basis. The preferred practice will be to give prima facie support to the motion by an affidavit of facts tending to show the reasonableness and feasibility of an independent analysis. The defendant may be preliminarily aided by a full disclosure by the State as to the alleged nature and quantity of the substance which came into the possession of the State, the nature and results of tests made by the State and the quantity of the substance still remaining in the State's possession. This information, to which the defendant is justly entitled, will assist the defendant in formulating a request which is reasonable and feasible under the existing circumstances. The use of an affidavit by the defendant will afford the State an opportunity to file a counter-affidavit effectively identifying disputed issues of fact, if any there be, which must be resolved by a hearing on the motion. *The trial court should approach the resolution of the problem with a disposition to permit an independent analysis at the State's expense if one is reasonable and practicable under the existing circumstances.*
>
> *Although he is not bound to do so, he may in the exercise of a sound discretion, especially where so-*

called "hard" drugs are involved, decline to order the sample released from the State's possession and require that the independent analysis be performed at the State's laboratory and/or under the State's supervision. (citations omitted). *He may in circumstances not unlike those existing in the instant case, when he is satisfied that the quantity of substance remaining in the State's possession is not sufficient to permit adequate and accurate testing or that the remaining substance must be preserved for evidentiary use at trial or that any other valid reason for such action exists, decline to permit any use of the substance for independent analysis.* In the latter event the defendant's analyst will of necessity be compelled to limit his investigation to consultation with the State's analyst and an examination of the State's laboratory facilities and testing methods. *An abuse of discretion will be shown only when the record discloses an arbitrary refusal to grant a reasonable and feasible request or a reasonable modification thereof.* The defendant must bear in mind his obligation to build an adequate record, that being indispensable to appellate review. (Emphasis added) (302 A.2d 84 at 89)

In the case of *Blanchard* v. *U. S.*, 360 F.2d 318 (5th Cir. 1966), the substance alleged to be a narcotic was tested by a chemist hired by the Government and then destroyed in accordance with procedures normally followed by the Drug Disposal Committee of Federal Narcotics Bureau. After the substance had been destroyed, the defendant filed a motion for production of the narcotics referred to in the indictment. When none was forthcoming, and upon conviction, an appeal was taken assigning as error the trial court's refusal to dismiss the indictment because

the Government failed to produce the narcotics. The United States Court of Appeals for the Fifth Circuit held:

> The trial court was correct in refusing to dismiss the indictment upon the failure of the Government to produce the narcotics, since it is not essential that the narcotics involved be offered and received in evidence as exhibits. Ware v. United States, 8th Cir. 1958, 259 F.2d 442; United States v. Bailey, 7th Cir. 1960, 277 F.2d 560, 565. (360 F.2d 318 at 320)

The Court went on to cite with approval the holding in *Ware* v. *United States*, 8th Cir. 1958, 259 F.2d 442, quoting *U. S.* v. *Singer*, 43 F.Supp. 863 (E.D. N.Y. 1942):

> Further, the mere fact that the sample was lost or destroyed, after analysis, does not prevent proof of such analysis, evidence having been offered to identify the sample analyzed, with the articles seized, and the loss or destruction of the sample goes solely to the weight of the evidence, which is for the Jury to pass upon. (360 F.2d 318 at 320)

In *People* v. *Sacchitella*, 343 N.Y.S.2d 169 (1973), the defendant was charged with the illegal sale of heroin which a police informer had allegedly purchased from the defendant with $2,400.00 contained in a brown paper bag. After the defendant was arrested, he filed a motion to require the District Attorney to produce the bag and the money which the prosecution was unable to produce as the items, by the time the motion to produce was filed, were unavailable. The New York Supreme Court held:

> It is now beyond dispute that the prosecution is required to produce, make available or make known the existence of physical or other evidence which may be exculpatory. (Brady v. Maryland, 373 U.S. 83,

83 S.Ct. 1194, 10 L.Ed.2d 215; People v. Savvides, 1 N.Y.2d 554, 154 N.Y.S.2d 885, 136 N.E.2d 853; Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690; Barbee v. Warden, 4 Cir., 331 F.2d 842)

* * *

However, nothing in these and similar cases authorizes a dismissal of the indictment where it is clear that the evidence sought is no longer in existence.

* * *

This is not a case of suppression or withholding of exculpatory evidence. The record is clear, up to this point, that the evidence does not exist. Its absence under such circumstances does not warrant dismissal of the indictment or a holding that defendant will be denied a fair trial if the evidence is not produced. (343 N.Y.S.2d 169 at 171, 172)

CONCLUSION

Respondent respectfully submits that there has been no violation of petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. The petitioner's circumstances pose no question of particular moment or indecision in the case law of the land and it is therefore respectfully submitted that the Petition for Writ of Certiorari should in all justice be denied as being without merit.

Respectfully submitted,

A. F. SUMMER
Attorney General

By: KAREN GILFOY
Special Assistant Attorney General

CERTIFICATE

I, Karen Gilfoy, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief In Opposition to Petition For a Writ of Certiorari to the Supreme Court of Mississippi to Albert S. Johnston, III, Johnston, Pritchard & Wright, 705 Watts Avenue, Post Office Box 1087, Pascagoula, Mississippi 39567.

This the 22nd day of October, A. D. 1974.

KAREN GILFOY
Special Assistant Attorney General